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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

PAUL C. GRASSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Dealer's Transport Company, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on May 23, 1952.

Opinions Below.

The final opinion of the Supreme Court of Illinois, which is dated May 20, 1952, was issued at the time of denying Petitions for Rehearing, and is reported in 412 Ill. 179 (R. 23-42) In denying the Petitions for Rehearing some 12 of the 18 pages of an earlier opinion were revised and the old portions superseded, so that the opinion reported is now the final and single opinion of the Court. The opinion of the Circuit Court of Illinois (R. 16-21) is not officially reported.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on May 23, 1952, after denial of the Petitions for Rehearing on May 20, 1952 (R. 43...). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The judgment of the Supreme Court of Illinois reversed a judgment denying a motion to strike out a defense; struck out the defense as insufficient; reinstated Count I of the complaint; and finally determined the unconstitutionality of the statute in question. It is a final judgment within the meaning of 28 U.S.C. 1257 because:

1. The judgment below conclusively disposes of a matter distinct from the general subject of the litigation, in that it finally adjudicates the unconstitutionality of the first paragraph of Section 29 of the Workmen's Compensation Law of Illinois—the only federal question in the case. And a constitutional question once decided by the Supreme Court of Illinois may not be raised again in the Illinois Courts. *People* v. *Blenz* (1925) 317 Ill. 639, 641, and cases cited; *Nichols, Illinois Civil Practice*, sec. 6583. It is the rule of this Court that a state court judgment is final for purposes of jurisdiction when it conclusively disposes of such a separable matter. *Radio Station WOW* v. *Johnson* (1945) 326 U. S. 120, 124-127; *Clark* v. *Williard* (1934) 292 U. S. 112; *Carondelet Canal Co.* v. *Louisiana* (1914) 233 U. S. 362, 372; *Forgay* v. *Conrad* (1848) 6 How. 201; 48 Harv. L.R. 302. The word "final" is not understood by this Court in a "strict and technical sense", but is given a "liberal" and "reasonable" construction. *Forgay* v. *Conrad* (1848) 6 How. 201, 203. In none of the cases cited above was the entire case disposed of by the State Court, but in each certain matters were finally disposed of. As was said in the *Carondelet* case, *supra*,

"In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved'." 233 U. S. 362, 372, quoted in the *WOW* case, 326 U. S. 120, 127.

"For the purpose of the finality which is prerequisite to a review in this Court, the test is * * * whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (See *Gorman* v. *Washington Univ.*, 316 U.S. 98)" *Dept. of Banking* v. *Pink* (1942) 317 U.S. 264, 268.

In our case, the burning question of constitutionality has been finally adjudicated, and the steps remaining to be taken in the litigation are the simple steps in a negligence case which could not remotely give rise to a federal question. See *Radio Station WOW* v. *Johnson* (1945) 326 U. S. 120, 127.

2. It is fundamental to the further conduct of the case, in that, if the judgment is permitted to stand (a) the statute is unconstitutional, (b) Count I of the complaint is to be reinstated for trial and (c) Count II must be stricken out. Conversely, if the decision below is reversed by this Court, the statute will be constitutional, Count I of the complaint must be stricken, and Count II may go to trial on a different theory. It is the rule in this Court that a judgment of a Court of Appeals may be reviewed on certiorari where it is "fundamental to the further conduct of the case": *United States* v. *General Motors Corp.* (1945) 323 U. S. 373, 377; *Land* v. *Dollar* (1947) 330 U. S. 731, 734; *Larson* v. *Domestic & Foreign Corp.* (1948) 337 U. S. 682, 685. See *Brown* v. *Western Railway of Alabama* (1949) 338 U. S. 294. See also *Hanover Star Milling Co.* v. *Metcalf* (1916) 240 U. S. 403; *Forsyth* v. *Hammond* (1897) 166 U. S. 506.

Questions Presented:

1. The Illinois Workmen's Compensation Law provides (Secs. 3, 6 and 11) that an Employee who is injured by a Third Party Employer in the course of his employment by a First Party Employer, whether the Third Party Employer is negligent or not, must be paid compensation by the First Party Employer, and that compensation is the Employee's exclusive remedy. The first paragraph of Section 29 of the Act "transfers" the common law right of suit of an Employee, who is injured by a negligent Third Party Employer subject to the Act and who is entitled to compensation therefor, to the First Party Employer liable for the compensation. It enables the First Party Employer to recover from a negligent Third Party Employer in an amount not exceeding the aggregate compensation which is payable, and leaves the Employee only his right of compensation.

The first question presented is whether the first paragraph of Section 29 may be held to be unconstitutional as beyond the scope of the police power, on the ground that it is not a regulation of the "master-servant" or "employment" relationship.

2. The first paragraph of Section 29 provided that the liability of a negligent Third Party Employer who *is* subject to the Act, for injury suffered by an Employee in the course of his employment by a First Party Employer, should be in the amount of compensation payable to the Employee by the First Party Employer. The second paragraph of Section 29, however, dealing with the situation where the injury suffered by the Employee in the course of his employment by the First Party Employer is caused by a negligent Third Party Employer who is *not* subject to the Act, specifically provides for a

right of action by the Employee against such a Third Party Employer, without limitation as to amount. The First Party Employer is to be reimbursed, out of the proceeds of such recovery, for compensation paid to the Employee.

The second question presented is whether the first paragraph of Section 29, standing alone, may be held to be unconstitutional on the ground that it sets up "classifications" which violate due process and equal protection.

3. Assuming, *arguendo*, that the first paragraph of Section 29 is unconstitutional on some ground, the third question is whether partial invalidity is possible on the ground that the first paragraph of the Section, even though deeply meshed in practical operation with Sections 3, 6 and 11 and the second paragraph of the Section, is wholly severable from and unrelated to other portions of the Act.

Statute Involved.

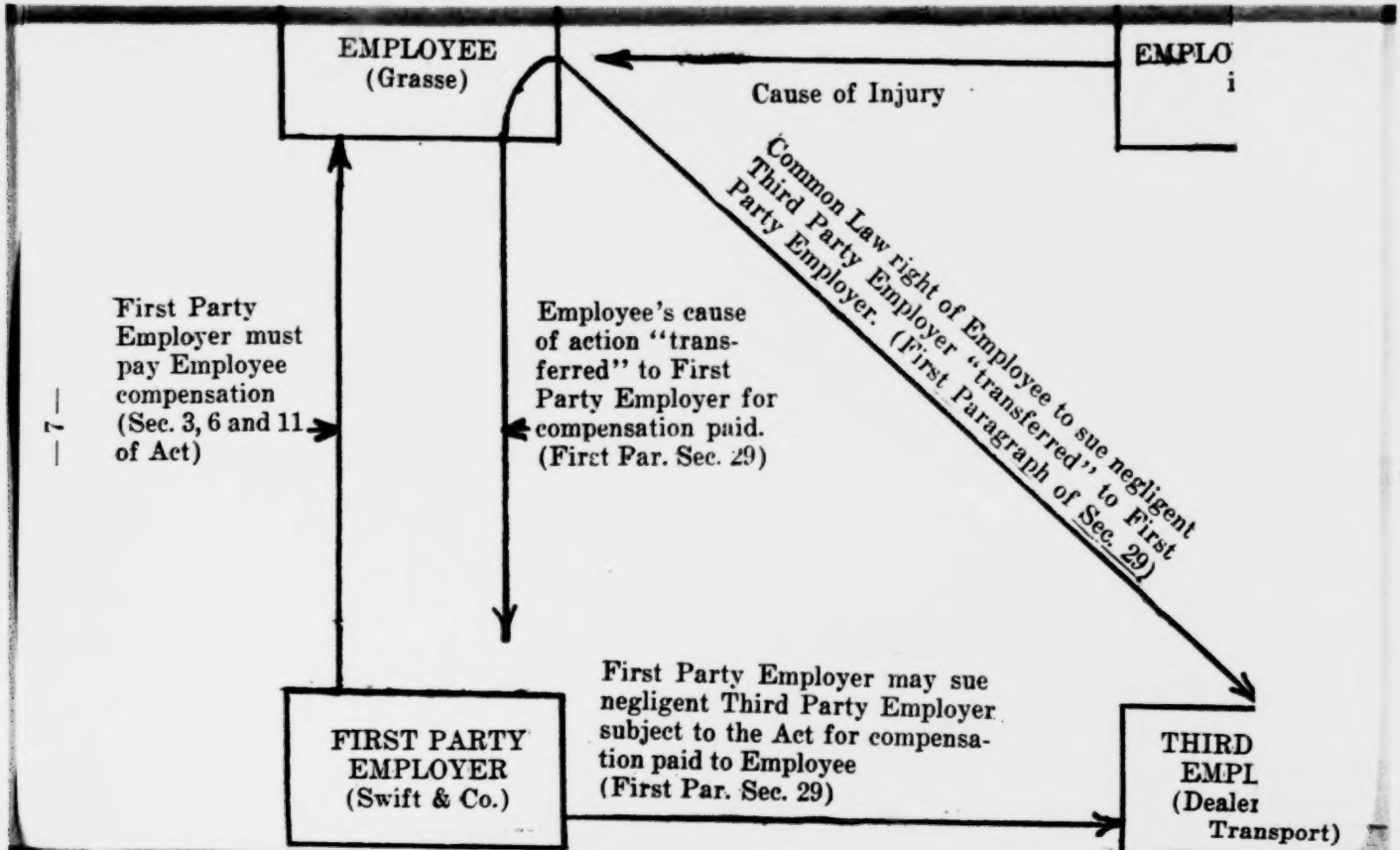
The first paragraph of Section 29 of the Workmen's Compensation Act of Illinois (in 1951 rearranged in Smith Hurd Illinois Statutes in Sec. 138.5(b)), which the Supreme Court of Illinois held to be unconstitutional, provides as follows:

> "Sec. 29. WHERE INJURY CAUSED UNDER CIRCUMSTANCES CREATING A LEGAL LIABILITY IN SOME PERSON OTHER THAN THE EMPLOYER. Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also

elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

Related portions of the Illinois Workmen's Compensation Act, Sections 3, 6 and 11 and the second paragraph of Section 29 thereof, are set forth in the Appendix.

Set forth opposite is a diagram of the paragraph as it relates to the allegations of the complaint:


EMPLOYEE
(Grasse)
Cause of Injury
EMPLO
i
Common Law right of Employee to sue negligent Third Party Employer "transferred" to First Party Employer. (First Paragraph of Sec. 29)
First Party Employer must pay Employee compensation (Sec. 3, 6 and 11 of Act)
Employee's cause of action "transferred" to First Party Employer for compensation paid. (First Par. Sec. 29)
First Party Employer may sue negligent Third Party Employer subject to the Act for compensation paid to Employee (First Par. Sec. 29)
FIRST PARTY EMPLOYER
(Swift & Co.)
THIRD EMPL
(Dealer
Transport)

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Summary Statement.

Plaintiff-Respondent, Paul C. Grasse, is an employee of Plaintiff, Swift & Company, a corporation, (R. 4, 6). He alleges in Count I of his complaint that he was injured while driving a Swift truck "in the course of and arising out of his employment" by Swift & Company (R. 4) by the negligence of an employee of Defendant-Petitioner, Dealer's Transport Company, a corporation (R. 2, 3,-5). He asks common law damages in tort.

In Count II of the complaint plaintiffs rely on the first paragraph of Section 29 of the Illinois Workmen's Compensation Act (in 1951 rearranged in Smith Hurd Illinois Statutes in Sec. 138.5(b)), alleging that, pursuant to that Act Plaintiff Swift & Company has paid Plaintiff Grasse some $9,134.79 as Workmen's Compensation. They allege that "under and by virtue of the provisions of Section 29 of the said Workmen's Compensation Act the Plaintiff Swift & Company is entitled to have judgment against the defendant to reimburse Swift & Company" for the compensation payments made to Grasse (R. 5).

In Paragraphs 8, 9 and 10 of its answer, Defendant-Petitioner set up an additional defense to Count I, the defense that Plaintiff Grasse had been paid compensation by Plaintiff Swift & Company under the Illinois Workment's Compensation Act, and that his cause of action against Defendant, if any, was accordingly thereby "transferred" to his employer, Swift & Company by virtue of the provisions of the first paragraph of Section 29. This additional defense and Count II of the complaint are similar in legal import. Both rely on the first paragraph of Section 29.

The plaintiff moved to strike Paragraphs 8, 9 and 10 of the defendant's answer, on the ground that the first paragraph of Section 29, the basis of Count II of his complaint, was unconstitutional and hence not a defense to Count I thereof.

The motion to strike was denied by Circuit Court Judge Harry Fisher, who held that Paragraphs 8, 9 and 10 "constitute a valid defense to the claim alleged in Count I" and entered a judgment dismissing Count I (R. 1~~6~~, ~~19~~). On appeal to the Supreme Court of Illinois, however, the judgment of the Circuit Court was reversed, the motion was granted, the additional defense was stricken on the ground that the first paragraph of Section 29 was unconstitutional, and Count I was reinstated.

Specification of Errors.

1. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 of the Illinois Workmen's Compensation Act is not a regulation of the "master-servant" or "employment" relationship.

2. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 regulates "tort liability between persons who have no employment or other relationship".

3. The Supreme Court of Illinois erred in holding the first paragraph of Section 29 to be beyond the scope of the police power.

4. The Supreme Court of Illinois erred in holding the first paragraph of Section 29 to be unconstitutional.

5. The Supreme Court of Illinois erred in holding that the first paragraph of Section 29 sets up "classifications" which are arbitrary and a violation of due process and equal protection.

6. The Supreme Court of Illinois erred in refusing to hold the first paragraph of Section 29 to be a valid exercise of the police power.

7. The Supreme Court of Illinois erred in permitting plaintiff Grasse to assail the constitutionality of the first paragraph of Section 29.

8. The Supreme Court of Illinois erred in refusing to hold that plaintff is estopped to assail the constitutionality of the first paragraph of Section 29.

9. The Supreme Court of Illinois erred in refusing to hold that if the first paragraph of Section 29 could be held to be unconstitutional, the entire Workmen's Compensation Act of Illinois is unconstitutional and partial invalidity is impossible.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below is in Hopeless Conflict with Northern Ry. v. Meese, (1916) 239 U.S. 614 and the Whole Theory of Constitutionality of Workmen's Compensation Laws as Laid Down by this Court.

A. The Basic Question, Whether the Statute Regulates the Master-Servant Relationship, is a Federal Question.

The first paragraph of Section 29 is an integral part of the Illinois Workmen's Compensation Act as passed in 1913 and revised in 1917. It has been in force unshadowed by any claim of possible invalidity for over 35 years. But the Court below suddenly decided on May 20, 1952 that the Section did not even regulate the "master-servant" or "employment" relationship and hence was not constitutional under the police power, saying (412 Ill. 191, R.3/...):

> "Section 29, however, does not purport to regulate the relationship between employers and employ-

ees, which are a recognized class for special legislation, but modifies, and even eliminates under some circumstances, the tort liability of third parties who negligently injure employees engaged in another enterprise. It is evident, therefore, that the basis and justification for sustaining the exercise of the police power for the major portion of the Workmen's Compensation Act does not apply to section 29, which treats of a different situation, and regulates tort liability between persons who have no employment or other relationship. The fact that other portions of the act constitute a reasonable exercise of the police power does not mean that section 29, which has a different and distinct purpose, is *per se* a proper exercise of the police power."

The Court below conceded that if the Section, like the other provisions of the Act, did regulate the master-servant or employment relationship, it would be constitutional as a reasonable exercise of the police power, saying (412 Ill. 190, 191, R.3/):

"As hereinbefore noted, the constitutionality of the Illinois Workmen's Compensation Act, as well as those of other States, has been sustained as a valid exercise of this police power. (*New York Central Railroad Co.* v. *White,* 243 U. S. 188.) However, it is evident that the primary purpose of the Workmen's Compensation Act is to afford employees and their dependents a measure of financial protection, (*Baker & Conrad, Inc.* v. *Chicago Heights Construction Co.,* 364 Ill. 386, 393,) and that a major portion of the statute pertains, not to tort liability, but to a system for imposing liability without fault upon employers for the benefit of their own employees. The basis upon which the validity of such legislation was sustained was as a regulation of the master-servant relation. Inasmuch as the general public had an interest in the loss of life and disability incurred in the course of a hazardous employment, this system

> of liability and compensation between employers and their own employees injured in the course of their employment was deemed to be a reasonable exercise of the police power."

The right to exercise the police power is vested in the States, and the existence of that right is federally-guaranteed to the Legislatures and people of the States, including this Petitioner, by the Tenth Amendment. Since it is a federal right, the questions which underlie it or upon which its existence depends, are federal questions. Accordingly, when the constitutionality of a State Workmen's Compensation Law under the police power depends upon whether it regulates the "master-servant" or "employment" relation, that question is a federal question for decision by this Court. *Crowell* v. *Benson* (1932) 285 U. S. 22, 56, and see *New York Central R. R.* v. *White* (1916) 243 U. S. 188, 197, 198.

As was said in *Crowell* v. *Benson* (1932) 285 U. S. 22, 56, in dealing with the Longshoremen's and Harbor Workers Compensation Act, a similar statute:

> "In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment."

Just as in *Crowell* v. *Benson* the fact of the master-servant relation was the pivot of the statute and underlay the constitutionality of a statute enacted under the power of Congress to alter the rules of liability in admiralty jurisdiction, so in our case the fact of the master-servant relation is the pivot of a similar statute and underlies its constitutionality under the police power.

Moreover, the delineation of the scope of the police power under the Tenth Amendment, as a Federal right guaranteed to the people of the States, is a matter for final determination by this Court. This Court has delineated with some care the scope of the Tenth Amendment as a Federal right, when the question was possible invasion of the police power by the Federal Government. *United States* v. *Butler* (1936) 297 U. S. 1, 37, 68; *Schechter Corp.* v. *United States* (1935) 295 U. S. 495, 544-546; *Hammer* v. *Dagenhart* (1918) 247 U. S. 251, 276; *Kansas* v. *Colorado* (1907) 206 U. S. 46, 89, 90. It should also do so here, where this Petitioner has been denied the benefits of the police power; and where the State Legislature affirms and the State Judiciary denies the existence of this federally-guaranteed right of police power as the constitutional foundation of the statute.

B. The First Paragraph of Section 29 Does Regulate the Master-Servant Relationship.

We submit that the first paragraph of Section 29 is a perfectly clear regulation of the master-servant or employment relationship, for the reason that the "master-servant" or "employment" relationship is its subject matter. All that that paragraph purports to do is to "transfer" the common law cause of action, if any, which the Employee has against a negligent Third Party Employer subject to the Act, to his First Party Employer liable for compensation. The latter is given what is essentially a subrogation right to recover the amount of compensation payable to the Employee as required by Sections 3, 6 and 11 of the Act, and recovery is limited to that amount.

Also, the first paragraph of Section 29 is definitely meshed with Sections 3, 6 and 11 of the Act which require

the payment of compensation to the Employee by the First Party Employer in the event of injury by a Third Party Employer in the course of the Employee's employment, whether the Third Party Employer is negligent or not. While the Employee's common law right of recovery against a Third Party Employer is transferred to the First Party Employer, under Sections 3, 6, and 11 the Employee is given, to compensate for the transfer, a right of compensation for injury, regardless of fault, including injury by a Third Party Employer where there is no negligence. And while the Third Party Employer's liability is limited in amount, in this particular situation, as compensation therefor, the additional burden of liability without fault is imposed upon him for injuries suffered by his own employees, including those caused by employees of other Third Party Employers.

C. The Meese Case Upheld a Similar Statute as a Regulation of the Master-Servant Relationship.

Moreover, except for the decision below, it may perhaps be said to be universal law in this country that Workmen's Compensation Statutes regulating the relations of the Employee, First Party Employer and Third Party Employer do constitute regulation of the master-servant or employment relationship, valid under the police power.

That appears to be settled in this Court by *Northern Pacific Railway Co.* v. *Meese,* (1916), 239 U. S. 614, which is on all fours with our case so far as the character of the regulation of such a statute is concerned. There Meese, an employee of the Seattle Brewing Company, was killed in the course of his employment, and his heirs were entitled to compensation therefor under the Workmen's Compensation Law of the State of Washington. They claimed that Meese was killed through the

negligence of the Northern Pacific and sued the latter in tort. The Northern Pacific demurred on the ground that the Workmen's Compensation Law of Washington, a compulsory act similar to ours, had provided an exclusive remedy for injuries caused by third parties and suffered by workmen within the course of their employment, and that the Washington act had thus absolutely cut off any right to sue the third party Railway in tort.

The plaintiff contended bluntly that "To extend the application of the Workmen's Compensation Law to right of action of a workman against a third person under the facts of this case, would be unconstitutional, and would be a discrimination against the respondents and not an equal protection under the law." (239 U. S. 616).

This Court rejected Meese's contention, sustained the demurrer and dismissed the complaint, relying on the articulate opinion of *Peet* v. *Mills* (1913) 76 Wash. 437, from which it quoted as follows, spelling out how the employment relation was affected by the statute:

> " " * * The conclusion is evident that, in the enactment of this new law, the Legislature declared it to be the policy of this State that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employes; and that it was the further policy of the State to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full and complete, *reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed.* We can conceive of no language the Legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say with appellant that the intent of

> the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens * * * That in so doing the *legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed,* is equally clear from the language of section 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and "such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever" * * *' For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing except as they are saved by the provisos of the act, are done away with." (Emphasis added)

Northern Pacific Railway Co. v. *Meese, supra,* is the settled law in this Court. We cited it repeatedly to the Court below, but that Court did not even deign to mention it. Now the decision below would silently undermine the *Meese* case on this question of federal law, and deprive the people of Illinois, including the Petitioner, of its benefits. Hence we submit that the decision below cannot be allowed to stand without demolishing the very theory upon which State Workmen's Compensation Laws dealing with Employees, First Party Employers and Third Party Employers have been upheld by this Court under the police power—the theory that such statutes do regulate the "master-servant" or "employment" relationship.

The Court below simply failed to grasp the practical operation and effect of the first paragraph of Section 29 under the police power guaranteed by the Tenth Amendment.

2. The Decision Below is also in Hopeless Conflict With All Other Cases Upholding the Constitutionality of Similar Laws.

Moreover, following the *Meese* case, many states have regulated this relationship between the Employee, the First Party Employer and the Third Party Employer, as part of Workmen's Compensation Schemes, in various ways. And the constitutionality of these laws has been universally upheld under the police power. While Washington cuts off all right of action by the Employee against the Third Party Employer, (the *Meese* case, *supra*), some states require an election. Under these statutes, if the Employee elects to seek compensation from the First Party Employer, he becomes forever barred from a recovery in tort against the Third Party Employer. This is another type of perfectly clear regulation of the relationship between the Employee, the First Party Employer and the Third Party Employer. *Mosely* v. *Lily Ice Cream Co.*, (1931) 38 Ariz. 417, 300 P. 958; *Mitchell* v. *Usilton* (1922), 146 Tenn. 419, 242 S.W. 648; *Eagle Picher Lead Co.* v. *Kirby* (1925) 109 Okla. 96, 235 P. 176; *Hicks* v. *Peninsula Lumber Co.* (1923) 109 Ore. 305, 220 P. 133; *Travelers Insurance Co.* v. *Louis Padula Co.*, (1918, 224 N. Y. 397, 121 N.E. 348. Compare the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933.

Without exception, moreover, the decisions dealing with similar statutes insofar as they reflect light on the character of the subject matter regulated, indicate clearly

that it is the "master-servant" or "employment" relation which is regulated.

> "To sum up, our act positively ends the 'jurisdiction of the courts' on 'all phases' of master and servant liability. Now, it is undeniable that liability for a stranger's acts on the premises is one of those phases * * *." (*Stertz* v. *Industrial Ins. Com.*, 158 Pac. 256, 91 Wash. 588.

There is a "community of interest as between the employer and the employee in the action against the negligent third person * * * there is but one cause of action." (*Black, Sivalls & Bryson* v. *Sheahan* D. C. Kans. 1950) 88 F. Supp. 639.)

> "In the *Clark* case we declared that whether an employee injured by a third person shall receive payment under the compensation act and also be accorded the right to sue the tort feasor for damages and thus, in effect, permit double recovery, is a matter of legislative control." (*Chisholm* v. *Vocational School for Girls* (1937) 64 P. (2d) 838, 103 Mont. 503)
>
> "Why should the right to sue an independent tort feasor be taken from the employee? Whatever the answer may be, the fact is that the Legislative Assembly had the power to take away the right (unless already accrued) if it saw fit to do so. * * *
>
> "* * * the wrongdoer in such cases may be financially responsible, and yet he may not—in most cases he is not. In either case the employee receives compensation * * *". (*Clark* v. *Olson* (1934) 31 P. (2d 283, 96 Mont. 417)
>
> "The statute in question deprives the plaintiff of her common law cause of action against the defendant but it establishes another remedy in its place, to wit: the right of compensation against her employer." (*Fellows* v. *Seymour* (1939) 171 Misc. 833, 13 N.Y.S. (2d) 803.)

Other cases hold that compensation may be made the "exclusive remedy" for injuries caused by a Third Party Employer which are suffered by an Employee in the course of his employment.

Georgia Casualty Co. v. *Haygood* (1923) 97 So. 87, 210 Ala. 56.

Victory Sparkler & Specialty Co. v. *Franks* (1925) 128 A. 635, 147 Md. 368.

Bruce v. *McAdoo* (1922) 211 P. 772, 65 Mont. 275.

King v. *Union Oil Co. of Cal.* (1933) 24 P. (2d) 345, 144 Or. 655.

3. The Alternative Holding of the Court Below that the Statute Sets Up "Classifications" Which Are Arbitrary and Unconstitutional is Contrary to the Applicable Decisions of this Court and So Patently Untenable as to Be Fanciful.

First, we have this basic question, whether the statute regulates the master-servant or employment relation. And we have argued above that, if the decisions of this Court are to be followed, that question should be answered in the affirmative.

Second, to hold that the statute does regulate the master-servant or employment relationship is to demolish the alternative holding below that the statute regulates "tort liability between persons who have no employment or other relationship".

Here, however, arguing in the alternative, we shall endeavor to show that even on the assumption of the Court below that the latter is only what was regulated, the Court below was wholly in error in its holding as to the practical operation and effect of the statute and that its alternative holding of unconstitutionality is so patently

untenable as to be fanciful and wholly devoid of logical support.

The Court below, after relying on *Truax* v. *Corrigan* (1921) 257 U. S. 312, said that the statute set up "arbitrary classifications" of "injured employees", in that two classes of "injured employees" were established, those injured by a Third Party Employer subject to the act who could not be sued in tort, and those injured by a Third Party Employer not subject to the act who could be sued in tort. This, said the Court below, was an "arbitrary classification" (R. 32, 35-36)

In going that far, moreover, the Court below misstated our contentions, saying that we had contended below that "the alleged classifications have been established by judicial interpretation" (412 Ill. 193, R. 33.). But that is error. We contended there, as we do here, that the first paragraph of Section 29 (for that is all that is here involved) does not set up any "classifications" at all. On the contrary, the decisions of this Court dealing with due process and equal protection merely require, in this connection, that all persons subject to legislation be treated alike in the same situation and under like circumstances and conditions. *Southern R. Co.* v. *Greene*, (1910) 216 U. S. 400; *Barbier* v. *Connolly* (1885) 113 U. S. 27, 31-32.

Under the first paragraph of Section 29, all persons affected are governed by the same rule in the same situation or circumstance. There are not several classes of "injured Employees" but only a single class of "Employees", set up by the first paragraph of the Section.

Even the entire Section 29 treats all Employees subject to the Act alike. That is, *all* Employees in the situation of injury by a negligent Third Party Employer subject to the Act are entitled only to compensation and may

not sue the Third Party Employer in tort. And *all* Employees subject to the Act who are injured by a negligent Third Party Employer who is not subject to the Act may sue the latter in tort, the proceeds thereof to go first to reimburse the First Party Employer for compensation paid.

All First Party Employers subject to the Act may recover over against a negligent Third Party Employer for compensation paid to the Employee.

All Third Party Employers subject to the Act are liable only for compensation paid by the First Party Employer.

As for Third Party Employers not subject to the Act, they are all treated alike but governed by entirely different rules, as indeed, under *New York Central* v. *White* (1916) 243 U. S. 188, may be done. They may be sued in tort.

The first paragraph of Section 29 simply does not set up "classifications" of "injured employees". In holding otherwise the Court below fell into a profound error as to the operation and effect of the statute, which is fundamental enough to render the alternative ground of its holding untenable on its face.

4. In Permitting Plaintiff Grasse to Assail the Constitutionality of Section 29, the Decision Below is in Conflict with the Applicable Decisions of this Court.

The complaint, paragraph 10-13 (Record pp. 5, 6) admits in perfectly clear language that the plaintiff was injured by his employer, Swift & Company, which he alleges is bound by the Workmen's Compensation Act of the State of Illinois, and that Swift & Company has made "compensation payment" • • • under the provisions of said Workmen's Compensation Act to the plaintiff. Indeed, in Paragraph 11 of the complaint, (R. 3) the plaintiff ad-

mits that he has been paid the sum of $9,134.79 by Swift & Company "*as required by the provisions of the said Illinois Workmen's Compensation Act*". He further alleges, Paragraph 12, that Swift & Company may hereafter be required to pay out additional sums of money to the plaintiff "in compensation payments". Thus plaintiff has voluntarily sought and obtained the benefits under the Act running to over $9,000. With the cash benefits of the Act safely in his pocket, he now seeks to avoid a restriction specifically imposed by the legislature to balance, and as the very consideration or compensation for, the making of these cash benefits available to him. Stated another way, the plaintiff wishes to eat his cake and have it, too.

In permitting this plaintiff to claim under the Act and accept its compensation benefits with one hand, and assail its constitutionality with the other, the decision below is contrary to the settled line of decisions of this Court beginning with *Daniels* v. *Tearney* (1880) 102 U.S. 415 and collected and discussed in *Gray* v. *Commodity Credit Corporation* (1945) 63 F. Supp. 386. It is also contrary to the applicable state decisions which hold that a person may not accept Workmen's Compensation and then assail provisions of the Act governing the award thereof. *Ethen* v. *North Dakota Workmen's Compensation Bureau,* (1932) 244 N.W. 32, 62 No. Dak. 394; *Ison* v. *Western Vegetable Distributors,* (1936) 59 P. (2d) 649, 48 Ariz. 104.

Moreover, plaintiff Grasse, an Employee, may not assail the constitutionality of the section insofar as it might classify or affect either First Party Employers or Third Party Employers, for any such problems do not affect his legal rights and he has no legal standing to complain with respect thereto. *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.,* (1919) 249 U.S. 134; *Ison* v. *Western Vegetable Distributors,* (1936) 59 P. (2d) 649, 655, 48 Ariz. 104; *Cuthbertson* v. *Union Pacific Coal Co.,* (1936) 62 P. (2d) 311, 315.

The speculative and abstract dissertation of the Court below on these subjects has no basis in our judicial system, and is contrary to the well-settled rule that constitutional questions may not be passed upon in the abstract but only in genuine cases or controversies. It is inappropriate here to dwell on the point that the Court's conclusions on these academic matters were also erroneous.

5. The First Paragraph of Section 29 is So Integrated With the Balance of the Act That the Act Must Stand or Fall in Its Entirety.

Sections 3, 6 and 11, not the first paragraph of Section 29, of the Act require the payment of compensation by the First Party Employer to the Employee in the event of injury by a Third Party Employer. And so far as the Third Party Employer subject to the Act is concerned, by limiting the amount of his liability, Sections 6 and 29 provide a *quid pro quo* or balancing "condition, consideration or compensation" (see *Cooley, Constitutional Limitations*, Eighth Edition, P. 362) for the other provisions of the Act which impose liability without fault upon him for injuries sustained by his Employees generally in the course of their employment, including injuries caused by other Third Party Employers.

We make this argument, not to urge that the whole Act be declared unconstitutional, but to show how integral a portion of the Act the first paragraph of Section 29 is, and that the effect of the decision below is to crudely mutilate the legislative purpose. And it further shows how vividly the statute does regulate the master-servant or employment relationship.

6. The Decision Below, Mutilating the Statute, Has Left Its Subject Matter in Chaos and Confusion.

The effect of the decision below is to invalidate the first paragraph of Section 29 as to Third Party Employers *automatically* bound, but to leave it in force as to those *electively* bound by the Act. This astounding result, something which the Legislature never intended, and suddenly making administration of the Act most difficult, illustrates the undesirable practical effects which flow from the failure of the Court below to grasp the relationship of the statute to the master-servant relationship and the police power.

7. The Great Practical Importance of Review by this Court.

We think it may be fairly stated that, if the decision below is allowed to stand;

A. From 1,000 to 5,000 new lawsuits against Third Party Employers liable for Workmen's Compensation will be filed within the next year, and in each succeeding year, as a result of the decision below. These will add to the heavy burdens already placed on the Illinois Courts, which are now four years behind in cases of this character.

B. The rate structures of the Chicago Transit Authority and Insurance Companies doing business in Illinois will be extensively revised upward, pushing insurance and transit fare rates even higher upward.

CONCLUSION.

The Court below utterly failed to grasp the practical operation and effect of the first paragraph of Section 29 on the master-servant relationship and the police power. A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Illinois Workmen's Compensation Act.

Sec. 3. APPLIES AUTOMATICALLY. The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section.

2. Construction, excavating or electrical work, except as provided in sub-paragraph 8 of this section.

3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse-drawn or motor driven vehicle where the employer employs more than two employees in the enterprise or business, except as provided in sub-paragraph 8 of this section.

4. The operation of any warehouse or general or terminal storehouses.

5. Mining, surface mining or quarrying.

6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities.

7½. Any enterprise in which sharpedged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, de-

molish or reconstruct machinery, except as provided in sub-paragraph 8 of this section.

8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered.

9. Any enterprise, business or work in connection with the laying out or improvement of subdivisions of tracts of land.

10. Any enterprise for the treatment of cross-ties, switch-ties, telephone poles, timber or other wood with creosote or other preservatives. [Amended by Act approved June 10, 1929.]

Sec. 6. Employee's Right To Recover Damages. No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury; provided, however, that in any action now pending or hereinafter begun to enforce a common law or statutory right to recover damages for negligently causing the injury or death of any employee it shall not be necessary to allege in the declaration that either the employee or

the employer or both were not governed by the provisions of this Act or of any similar Act in force in this or any other State: Provided, further, that any illegally employed minor or his legal representatives shall, except as hereinafter provided, have the right, within six months after the time of injury or death, to file with the commission a rejection of his right to the benefits under this Act, in which case such illegally employed minor or his legal representatives shall have the right to pursue his or their common law or statutory remedies to recover damages for such injury or death; and provided, further, that no payment of compensation under this Act shall be made to an illegally employed minor, or his legal representatives, unless such payment has first been approved by the commission or any member thereof, and if such payment has been so approved such payment shall be a bar to a subsequent rejection of the provisions of this Act. [Amended by Act approved July 3, 1931.]

Sec. 11. Compensation Measure of Responsibility Employer Assumed Under Act. The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in section three (3) of this Act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and whose election to continue under this Act, has not been nullified by any action of his employees as provided for in this Act. [Amended by Act approved June 25, 1917.]

Sec. 29 (Second Paragraph) Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this Act, then legal

proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

PAUL C. GRASSE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE JUDGMENT AND OPINION BELOW.

March 20, 1952, was the date of both the judgment (Tr. 43) and opinion (Tr. 23) of the Illinois Supreme Court so that the dates mentioned on page 1 of the Petition are incorrect. We make no point of the timeliness of the Petition.

JURISDICTION.

The question of this Court's jurisdiction is discussed below under Point I, where our answer to the arguments set forth at pages 2 and 3 of the Petition will be found.

QUESTIONS PRESENTED.

Under the above heading on page 4 Petitioner begins using some esoteric phraseology that requires comment. Petitioner's studied use of the expressions "First Party Employer" and "Third Party Employer", as well as capitalizing the word "Employee" each time it is used in the same sentence with those expressions (Petition, 4, 5, 13, 14, 16, 17, 20, 21, 23, 24) diverts attention from the true nature of the classifications created by the first paragraph of Section 29, which gave immunity to *all* third-party tortfeasors bound by the Act, including employees (*Thornton* v. *Herman*, 380 Ill. 341) as well as employers, if the person injured happened fortuitously to be an employee bound by the Act; whereas it denied such immunity to *all* third-party tortfeasors not bound by the Act, including employees, employers and persons who were neither employers nor employees, such as farmers, lawyers, housewives. The expressions "Third Party Employer" and "First Party Employer" are unknown in Illinois law, were not used by either party in the briefs or arguments filed in the courts below, and first made their appearance in Petitioner's Petition for Rehearing filed in the Illinois Court. They were evidently contrived by Petitioner in an effort to give some color of verbal plausibility to Petitioner's theories, in the expectation that persons reading them would be impressed by Capital Letters and would overlook the fact that they do not make Sense.

SUMMARY STATEMENT.

Accuracy in the summary statement is one of the prime requisites of a petition for writ of certiorari, yet at pages 8 and 9 of the Petition we find repeated three times in various forms ("In Count II of the complaint plaintiffs rely on the first paragraph of Section 29" etc. "This additional defense and Count II of the complaint are similar in legal import. Both rely on the first paragraph of Section 29". "The plaintiff moved to strike * * * on the ground that the first paragraph of Section 29, the basis of Count II of his complaint, was unconstitutional" etc.) the statement that in Count II the plaintiffs rely on the first paragraph of Section 29, a statement that is not true and is not substantiated in the record. This statement puts Respondent's counsel and the co-plaintiff, Swift & Company, in the invidious and rather stupid position of denying the validity of a statutory provision and at the same time relying on it. In Count II we referred only generally to the "provisions of Section 29" (Tr. 5) and we neither mentioned nor relied upon the provisions of the first paragraph of that section; we relied on the provisions of other paragraphs of Section 29 as suggesting a basis for the claim of Swift & Company alleged in Count II, and this fact is well known to Petitioner, since in the Appellant's Brief filed in the Illinois Court we said, at page 46, that the second and succeeding paragraphs of the section "should be held valid and construed to apply to the claims of injured employees against all third-party tortfeasors, regardless of whether they are bound or not bound by the Act", and it cannot be denied that if Grasse's claim were governed by the second paragraph of the section Swift & Company would be entitled to prosecute its claim alleged in Count II. Count II is

not involved in the present proceeding before this Court, and Petitioner was not required to mention it. Petitioner's gratuitous references to it three times in a relatively short summary statement, as well as the repeated misrepresentation prejudicial to the Respondent, are factors that the Court should take into consideration in judging the merits of the Petition.

The contents of Count I are not accurately stated in the first paragraph of the Summary Statement (Petition, 8). In that count (Tr. 1-3) it is not alleged that Grasse was driving a truck in the course of his employment by Swift & Company. Petitioner's record references are to Count II (Tr. 3-6).

Both plaintiffs, Grasse and Swift & Company, joined in the motion challenging the validity of the first paragraph of Section 29 (Tr. 9).

The judgment of the Supreme Court of Illinois was that the Circuit Court erred in denying plaintiff Grasse's motion to strike that portion of defendant's answer predicated on the constitutionality of the first paragraph of Section 29, and in dismissing plaintiff's claim as alleged in Count I of the complaint; the judgment of the Circuit Court was reversed and the cause remanded with directions to reinstate Count I of the complaint (Tr. 42, 43).

REASONS FOR DISMISSING OR DENYING THE PETITION.

I.

The petition for writ of certiorari should be dismissed or denied for want of jurisdiction. This Court is without jurisdiction to review the decision of the Supreme Court of Illinois for the following reasons:

A.

The Illinois Court's decision is based on independent non-federal grounds adequate to support it, regardless of any federal question. The Illinois Court held that the provision of the statute was invalid as in conflict with several articles of the Illinois Constitution.

The Supreme Court of Illinois (to which, for the sake of brevity, but with due respect, we refer as the Illinois Court) said in its opinion:

> "On the basis of the foregoing analysis it is apparent that the arbitrary classifications created by the first paragraph of Section 29 of the act do not constitute a valid exercise of the police power, and violate the guaranties of due process of law and equal protection of the laws under the Federal and State constitutions, as well as section 22 of article IV of the Illinois Constitution, forbidding special laws granting special privileges and immunities, and the policy of the State constitution set forth in section 19 of article II, providing that every person ought to find a certain remedy in the law for all injuries and wrongs which may be received to an individual's person, property or reputation." (Tr. 39, 40; 412 Ill. at p. 200.)

And in reference to the federal and state constitutional

rules against arbitrary classification the Court earlier in the opinion said:

> "Although these constitutional guaranties overlap, so that a violation of one may involve the violation of the other, the spheres of protection they offer are not coterminous, for the guaranty of equal protection of the laws extends beyond the requirements of due process. (*Truax* v. *Corrigan*, 257 U. S. 312.) Moreover, section 22 of article IV of the Illinois constitution supplements the equal protection provision of the fourteenth amendment of the federal constitution, by prohibiting the passage of a special law granting to any corporation or association or individual any special or exclusive privilege, immunity or franchise. *Michigan Millers Mutual Fire Ins. Co.* v. *McDonough*, 358 Ill. 575." (Tr. 34; 412 Ill. at p. 194.)

Thus the Illinois Court held the statutory provision in question invalid on the independent, non-federal ground of conflict with the state constitution, and this holding is clearly and unambiguously expressed in the opinion. The provisions of the Illinois constitution, which the plaintiffs relied upon and which the Illinois Court held were violated, were the following:

> Article II, Sec. 2: "*No person shall be deprived of life, liberty or property without due process of law.*" (Illinois Revised Statutes, 1951, Vol. 1, page 9.)

This due process clause of the state constitution has often been construed and applied by the Illinois Court independently of the Fourteenth Amendment to the U. S. constitution. In *Off & Co.* v. *Morehead*, 235 Ill. 40, a statute was held invalid upon the sole ground of conflict with this clause, which the Court construed as follows (235 Ill. at p. 44):

> "'Due process of law' is synonymous with 'law of the land,' and it means a general public law, binding upon all members of the community under all cir-

cumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Millet* v. *People*, 117 Ill. 294; *Frorer* v. *People*, 141 Ill. 171.

"The legislature undoubtedly has the constitutional power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. *Gillespie* v. *People*, 188 Ill. 176; *Harding* v. *People*, 160 id. 459; *Ruhstrat* v. *People*, 185 id. 133; *Starne* v. *People*, 222 id. 189.

"The general principles running through all the cases is, that a statute which arbitrarily selects a class of individuals and subjects them to peculiar rules or imposes upon them special obligations or burdens from which other persons are exempt is unconstitutional."

The second Illinois constitutional provision upon which the decision in the present case was based is

Article IV, Sec. 22: "*The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—*

"*Granting divorces;*

* * * * *

"*Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatsoever.*

"*In all other cases where a general law can be made applicable, no special law shall be enacted.*" (Illinois Revised Statutes, 1951, Vol. 1, page 12.)

Conflict with this provision of the Illinois constitution was the sole ground for holding a statute invalid in *Jones* v. *Chicago, R. I. & P. R. Co.*, 231 Ill. 302, where the Court said (231 Ill. at p. 306):

> "By that provision of our constitution a guaranty is given that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal protection of the laws of the state."

The third Illinois constitutional provision upon which the Illinois Court based the present decision is

> Article II, Sec. 19: *"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay."* (Illinois Revised Statutes, 1951, Vol. 1, page 9.)

This provision of the Illinois constitution was the basis for the decision in *Heck* v. *Schupp*, 394 Ill. 296, where the Court held invalid a statute purporting to abolish the right of action for damages for criminal conversation.

These Illinois constitutional guaranties are therefore a living and substantial part of the state law, which the Illinois Court is obliged to respect and enforce. In construing these provisions of the Illinois constitution and determining whether a statute violates one or all of them, the Illinois Court must decide the questions of whether a classification is created by the statute, whether the classification is reasonable or arbitrary, and whether the statute is a reasonable and valid exercise of the police power. This the Illinois Court has done in the present case and has found the statutory provision in question invalid as in conflict with all three provisions of the Illinois constitution. The fact that the Illinois Court in its opinion incidentally found that the statute was in conflict with the Fourteenth Amendment, whether that finding be correct or erroneous, does not affect the integrity of the Illinois

Court's decision, or make it reviewable, since the non-federal grounds set forth in the opinion are independent, adequate, sufficiently broad to maintain the judgment, and plainly tenable. The decision is therefore not subject to review by this Court; *Lynch* v. *New York*, 293 U. S. 52; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, 1950 revision by Wolfson and Kurland, sec. 98, page 178.

B.

No final judgment has been entered in the Illinois Court, whose decision remanded the cause to the Circuit Court for trial. Under the provisions of U. S. Code, Tit. 28, Sec. 1257 (3), invoked by Petitioner as giving this Court jurisdiction, this Court has jurisdiction to review only final judgments of state courts.

The Illinois Court's decision is strictly interlocutory, since it reversed the judgment of the Circuit Court and remanded the cause to the Circuit Court with directions to reinstate Count I of the complaint. (Tr. 42, 43; 312 Ill. at p. 203.) No property has been taken from the defendant by the Illinois Court's decision; it merely means that there will be a trial in the Circuit Court on the issues raised by the allegations of the complaint and valid parts of the answer, and if there is substantial merit to the defense set forth in the unstricken allegations of the answer it is possible that the trial may result in a judgment in favor of defendant. Nor can it be said with certainty that the trial of the cause will not give rise to further federal questions. As of the present, only the abstract legal question of the constitutionality of the first paragraph of Section 29 has been decided, and no right of the Petitioner has been adjudicated.

In specifying that this Court shall have jurisdiction to

review *final* judgments of state courts section 1257 of 28 U. S. C. is the same as previous statutes governing the Court's jurisdiction to review state court judgments, and this provision of the law has always been construed to give the Court jurisdiction to review only final and complete judgments of state courts. In *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 546, the Court said:

> "Under sec. 237 of the Judicial Code, 28 U. S. C. sec. 344, only 'final judgments' of state courts may be appealed to this court. And it frequently has been said that for a judgment to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Thus, where the effect of the state court's decision is to grant a new trial, the judgment will not be final."

In *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68, the Court said:

> "Thus the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce* v. *Tobin*, 245 U. S. 18; *Martinez* v. *International Banking Corp.*, 220 U. S. 214, 223; *Mississippi Central R. Co.* v. *Smith*, 295 U. S. 718."

In *McComb* v. *Commissioners of Knox County*, 91 U. S. 1, in which the state appellate court decided the controlling federal question and remanded the cause to the trial court for a trial on the question of damages, this Court held there was no final judgment reviewable by this Court.

In the *Radio Station WOW* case, 326 U. S. 120, and the other cases cited at page 2 of the Petition, the state court

judgments held final and reviewable had the effect of immediately transferring some property from one of the litigants or of finally adjudicating a litigant's right to a lien or execution on property. No such result flows from the Illinois Court's judgment in the present case, where the paramount issues of liability and damages remain unsettled.

In the *Department of Banking* case, 317 U. S. 264, cited on page 3 of the Petition, no dispute existed as to whether a final judgment had been entered in the state court; this Court had to determine whether the petition for certiorari was timely, and that depended on which of two orders, entered in different courts on different dates, was the final judgment; the first order was held to be the final judgment because "the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur." (317 U. S. p. 268.) The record in the present case is obviously different, since the case was remanded to the trial court not for a ministerial act but for a trial on the issues of liability and damages.

None of the cases cited at pages 2 and 3 of the Petition holds that an interlocutory decision on a constitutional question, when all of the other issues in the case including the questions of liability and damages remain unsettled, is a severable matter so as to constitute a final judgment within the meaning of 28 U. S. C. 1257.

In the last paragraph on page 3 of the Petition it is said that Count I or Count II of the complaint must be stricken, depending on whether or not the Illinois Court's decision is left undisturbed; that legal proposition is unsound and unimportant, but it forms the basis for Petitioner's next statement: "It is the rule in this Court that a judgment of a Court of Appeals may be reviewed on certiorari where it is 'fundamental to the further conduct of the case,' "

and for the citation of *United States* v. *General Motors Corp.*, 323 U. S. 373, and other cases in which this Court reviewed interlocutory judgments of United States Courts of Appeal. Of course in those cases this Court was exercising discretionary jurisdiction given under an entirely different section of the statute, 28 U. S. C. sec. 1254, which does not require a judgment to be final to be reviewable, and which applies only to judgments of United States courts and not to the judgments of state courts. The rule obviously has no application in this case, where the Court's jurisdiction is defined and limited in 28 U. S. C. sec. 1257, and has never been invoked by the Court to review a state court's judgment.

C.

The Petition presents no substantial federal question.

This hydra-headed paragraph of the Illinois Workmen's Compensation Act, unfair to both employers and employees, which the Illinois Court has by a unanimous decision held invalid, has been a source of perplexing and troublesome litigation in the Illinois courts ever since its enactment; numerous decisions construing it only made its peculiarly oppressive and unreasonable classifications the more apparent.

Nowhere in the Petition is there any statement or argument against the Illinois Court's fundamental conclusion that the classifications of injured employees, employers and third-party tortfeasors created by the statute were unreasonable and arbitrary. It is patently impossible to conceive of such an argument. Petitioner's criticisms of the Illinois Court's opinion are so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous, and the Petition should be denied or dismissed on that ground. *Wabash R. Co.* v. *Flannigan*, 192 U. S. 29.

II.

REASONS FOR DENYING THE WRIT

1. The decision is not in conflict with any decision of this Court.

The question of whether the first paragraph of Section 29 regulated an employment relationship is one of construction of the statutory provision, and the Illinois Court construed it to be a regulation not of an employment relationship but of the subject of claims of injured employees against tortfeasors, there being no relationship whatever, employment or otherwise, between the injured employees and the tortfeasors. This construction of the statutory provision is binding on this Court, since the state court construction of a state statute is accepted as final. *J. Bacon & Sons* v. *Martin*, 305 U. S. 380; *Prince* v. *Massachusetts*, 321 U. S. 158, 163.

Invoking the Tenth Amendment (Petition, 12) does not make it a federal question. The right to exercise the police power is undoubtedly vested exclusively in the states, but it is not a federal right nor is its existence guaranteed to the *legislatures* of the states or to the Petitioner by the Tenth Amendment, which says: "The powers not delegated * * * are reserved to the *States* respectively, or to the people." The legislature is not the state and the Petitioner is not the people. The rendition of the judgment herein by the Illinois Court was an exercise by the state, through its judicial department, of the state power to construe its own constitution and statutes. The Tenth Amendment forbids this Court, as an arm of the federal government, to control the state in the exercise of that power unless its exercise runs counter to some other provision of the federal constitution.

Petitioner's argument under sub-point B, (pages 13, 14) involves an over-simplification of the disputed paragraph, which regulates the claims of injured employees not merely against "Third Party Employers" but against all third party tortfeasors, some of whom are arbitrarily given immunity. The opinion (Tr. 28, 29) correctly construes Section 29.

The *Meese case* (239 U. S. 614) is of no significance in connection with the present case and the Illinois Court's decision does not conflict with it. Although Petitioner's counsel say (Petition, 16) they cited it *repeatedly* to the Court below, the only time we know of its being cited to the Illinois Court was in the Petition for Rehearing filed subsequent to the judgment below; it was not mentioned in the 70-page Appellee's Brief filed by Petitioner below.

In the *Meese case*, which originated in a federal District Court, the principal question in dispute was the construction of a provision of the Washington compensation act; plaintiffs contended that the statute as well as the opinion in the *Peet case* (76 Wash. 437) should be construed as not applying to their claim; when the case reached this Court plaintiffs also made some argument invoking the equal protection clause, of which the details are not mentioned in the opinion, and which the Court considered merely a "suggestion" (239 U. S. p. 620). Practically all of the opinion is devoted to discussing the construction question; the Court held that the federal courts were bound to follow the law as construed by the state court in the *Peet case*, and plaintiffs' contentions in that regard were rejected. In concluding the opinion the Court disposed of the constitutional suggestion in one sentence, saying that plaintiffs' suggestion as to conflict with the equal protection clause was without merit, and that plaintiffs raised no other federal constitutional question (239 U. S. p. 620).

Thus the Court in the *Meese case* did not decide any constitutional question but decided that the plaintiffs' suggestion was without merit. The Court does not settle substantial constitutional questions on the basis of mere suggestions; such questions must be seriously brought forward, with particular specification of the respects in which a party's constitutional rights are infringed, and with reasonable argument to support his contentions, elements that the Court evidently considered lacking in the *Meese case*. Therefore any inference that the Court decided a constitutional question in that case must be regarded as *obiter dictum*. Furthermore, the case is distinguished from the present case in that the Washington statute was substantially different from the Illinois statute in respect to classifying employees and their claims against third-party tortfeasors; and in this case the plaintiffs raised and the Illinois Court decided questions not only under the equal protection clause of the federal constitution, but also under several other clauses of the federal and state constitutions (Tr. 9-14, 39, 40). It is apparent that the Petitioner made no mistake in deciding to omit citing the *Meese case* in its Appellee's Brief in the Illinois Court.

The *Peet case* (76 Wash. 437), quoted at length at pages 15 and 16 of the Petition, merely construed the Washington statute, and no constitutional question, state or federal, was decided therein.

2. That the Illinois Court's decision may conflict with the decisions of courts of other states does not present a federal question and is irrelevant.

The Respondent has not and does not contend that a statute giving an injured employee an election of remedies would be unconstitutional, so that the cases cited at page 17 of the Petition are irrelevant. The Illinois statute was compulsory and gave Respondent no election of remedies.

There is no need of our commenting at length on the cases from other states cited at pages 18 and 19 of the Petition; many of them involved questions of construction rather than constitutionality, and they did not involve the peculiar provisions of the Illinois statute. The Illinois Court was at liberty to disregard them, especially since Petitioner did not cite them in the court below.

3. The Illinois Court rightly decided that the statute set up unreasonable and arbitrary classifications of injured employees, employers and tortfeasors.

In its third point (Petition, 19) Petitioner charges that the Illinois Court's judgment is so patently untenable as to be fanciful. Such language coming from a poor prisoner in the Joliet penitentiary endeavoring to gain his freedom by writ of habeas corpus might be tolerated and excused; but coming from eminent counsel who are concerned about how the Illinois Court's judgment may affect insurance companies (Petition, 24) it can be regarded only as unseemly. The statute does set up arbitrary classifications which are clearly demonstrated in the Illinois Court's opinion.

At page 20 Petitioner ventures to misquote the Illinois Court, saying that the Illinois Court referred to a "Third Party Employer." Such an expression was not used by the Illinois Court in its opinion. And in indulging itself in this misquotation Petitioner injects a bit of sarcasm about the *Truax case* (257 U. S. 312) saying that "after relying on" that case, the Court below said that the statute set up arbitrary classifications etc. The record references are to R. 32, where the *Truax case* was mentioned, and R. 35, 36, where the Court said arbitrary classifications were created. It is apparent that what the Illinois Court said about arbitrary classification at Tr. 35, 36 was based upon the Illinois cases cited at Tr. 35-38 and not upon the *Truax case*, which

was cited at Tr. 32 as an illustration of the substantial difference between exercising the police power to regulate the employment relation of master and servant and exercising it to regulate the subject of claims of employees against tortfeasors with whom the employees have no relationship whatever.

At page 20 of the Petition the Petitioner charges that its contentions were misstated by the Illinois Court, which is not true. But since there is nothing in the transcript of record to which either Petitioner or Respondent can refer to show what petitioner's contentions were below, there is no way to settle the question and it must be disregarded.

4. The question of who can assail the constitutionality of a state statute is a question of state law, and is not a federal question.

In the present case the statute has been successfully assailed by Grasse, and it must be assumed that the state law permitted it. The question of whether he was entitled to assail it in the Illinois Courts is obviously a question depending on the state law, in which this Court is not interested. No such objection was raised in the court below by Petitioner in its Appellee's Brief.

5. Whether the void first paragraph of Section 29 is separable from the other provisions of the Illinois Workmen's Compensation Act, so that the latter provisions can stand as valid, does not present a federal question, and is not in dispute.

Petitioner does not contend that the other provisions of the Illinois Workmen's Compensation Act are invalid, nor does Respondent, so that there is no dispute. In any event, the decision by a state court that a void provision of a state statute is separable from its valid provisions does not

present a federal question; *King* v. *West Virginia*, 216 U. S. 92, 101; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466.

6. The subject matter of the statute has not been left in chaos or confusion.

In Illinois today tortfeasors are paying damages to everyone they injure, the same as in the other states of the Union, and they are not given immunity if the person injured fortuitously happens to be a working man, as formerly. There is no chaos or confusion. The Illinois Court made no pronouncement as to the rights of those electively bound by the Act, and rightly so, since the rights of such persons were not involved in the present case. This has not made the administration of the Act difficult, and in fact has created no difficulty whatever in its administration. In any event, the persons bound by the act electively probably do not exceed 2% of the total number bound by the act.

7. There is no reason involving practical importance for granting the writ.

The fact that 1,000 to 5,000 lawsuits may be filed within the next year against tortfeasors who formerly enjoyed immunity is of course no reason for allowing the writ. This arbitrarily selected class of tortfeasors now have safely in their pockets (Petition, 22) the money they should have paid out as damages to injured workingmen during the past 35 years. The Respondent Grasse does not have any cash benefits in his pockets, as Petitioner ventures to suggest (Petition, 22). Swift & Company did not put $8,070.65 in Grasse's pocket (Tr. 5) by paying hospital expenses, nurses' and doctors' fees to keep Grasse alive; nor was Grasse the gainer in receiving $19.50 per week during the 54 weeks of his total disability (Tr. 5), which was con-

siderably less than he would have earned in the absence of Petitioner's tort.

Allowance of the writ would only tend to delay the settlement of pending claims, and the administration of justice would not be served thereby. We therefore urge that the writ be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

v.

PAUL C. GRASSE,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Judgment and Opinion Below: In the interests of accuracy we must point out that the statement in Respondent's Brief (p. 1) that March 20, 1952 was the date of both judgment and decree, is incorrect. There was no "entry" (28 U.S.C. 2101 (c)) of the judgment dated March 20, until May 23, 1952, after the Petition for Rehearing, filed on April 14, 1952, was denied on May 20, 1952. The filing of the Petition for Rehearing suspended the running of the time for filing the Petition for Certiorari.

Questions Presented: Respondent does not object to the accuracy of the phrases "Employee", "First Party Employer" and "Third Party Employer" for our case, but he would like to broaden the case so as to bring in "tortfeasors" generally. Our case does not involve "tort-

feasors" generally, only the parties described—Employee, First Party Employer, and Third Party Employer.

Respondent's Summary Statement: Respondent denies that in Count II of the complaint Plaintiffs rely on the first paragraph of Section 29. However, Count II states that "Plaintiff, Swift & Company, was bound by the provisions of said Act in respect to all of its employees in Illinois, including the plaintiff, Grasse." (R. 4, 5). Since it is alleged that Swift & Company was bound by the Act, and the first paragraph of the Section is the only provision dealing with Third Party Employers bound by the Act, Count II of the complaint necessarily relies on that paragraph.

POINT ONE.

THE DECISION OF THE COURT BELOW IS NOT BASED ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

(In Reply to Respondent's Point 1 A, Page 5)

A. Respondent Makes No Claim That The Primary Holding of the Decision Below, That the Statute is Beyond the Scope of the Police Power Because it Does Not Regulate the Master-Servant Relationship, is Based on An Adequate Non-Federal Ground.

The argument made, beginning on page 5 of Respondent's Petition, regarding the existence of an alleged adequate non-federal ground to support the decision below, is not directed to the basic and primary holding of the decision below, which is embodied in the first question presented by the Petition (p. 4). Respondent's argument is directed solely to the *alternative* holding of the Court below, which is embodied in the second question presented.

The reason for this is that the Court below did not purport to base its primary holding on any non-federal ground. On the contrary, this, the basic ground of the decision, was based only on a federal ground, *viz.*: that the statute is beyond the scope of the police power because it does not regulate the master-servant relationship. The Court below stated (R. 31-32, Petition p. 11-12) that if the paragraph did regulate the master-servant or employment relationship, it would be a "reasonable exercise of the police power" (R. 31-32). Hence there is no possibility of there being a non-federal ground to support the primary or basic holding of the Court.

The statute can and should be upheld as a reasonable exercise of the police power because it does regulate the master-servant or employment relationship. The validity of the statute having been thus established, there would then be no occasion to consider the alternative holding of the Court and the subject of a possible non-federal ground.

B. To the Extent That the Alternative Holding of the Court Below, Dealing With "Classifications" Is Based On a Non-Federal Ground, the Non-Federal Ground is Wholly Inadequate to Support The Judgment.

1. The Alleged Non-Federal Ground is Plainly Untenable: The Court below lumped its alternative holding as to the effect of the so-called "classifications", as follows:

> "On the basis of the foregoing analysis, it is apparent that the arbitrary classifications created by the first paragraph of section 29 of the act do not constitute a reasonable exercise of the police power, and violate the guaranties of due process of law and equal protection of the laws under the Federal and State constitutions, as well as section

> 22 of Article IV of the Illinois Constitution, forbidding special laws granting special privileges and immunities, and the policy of the State constitution set forth in section 19 of article II, providing that every person ought to find a certain remedy in the law for all injuries and wrongs which may be received to an individual's person, property or reputation." (R. 39-40).

Under that language, the thing which was supposed to have created all the "violation" of constitutional guarantees was the "arbitrary classifications created by the first paragraph of Section 29 of the Act". Hence, if no "classifications" are created by the first paragraph of Section 29, then the thing which was supposed to have caused all the "violation" of the federal and state constitutions simply does not exist. And except for mere general assertion, Respondent does not dispute our argument that the first paragraph of the Section does not create any "classifications" at all, but that all persons affected are treated alike in the same situation and circumstance.

We submit, therefore, that the statements in the opinion below, to the effect that the first paragraph of Section 29 created "classifications" is a mere mirage which finds no support in the language of the statute. Accordingly, the alleged non-federal ground based on the existence of "classifications" is plainly untenable, and is error of the most transparent kind. It is settled by the decisions of this Court that if an alleged non-federal ground is plainly untenable, it is inadequate and this Court will take jurisdiction. *Williams* v. *Kaiser* (1945) 323 U.S. 471, 478-479; *Lawrence* v. *State Tax Commission* (1932) 286 U.S. 276, 282; *Ward* v. *Love County* (1920), 253 U.S. 17, 22.

2. The Alleged Non-Federal Ground Is Interwoven With the Federal Ground: Also, the alleged non-federal ground is, in its entirety, interwoven with the federal ground. For the Court below held that the alleged "classifications" were "arbitrary", and that this was a violation of the equal protection and due process clauses of the federal and Illinois constitutions and of other comparable provisions of the Illinois constitution. It was the supposed "arbitrariness" of the so-called "classifications" which were said to have the *uniform* effect of violating all these provisions of both federal and state constitutions. The single ground of the violation of both federal and Illinois constitutions is the theory of arbitrariness. Since there are not even any "classifications" set up by the statute which could be "arbitrary", then the whole ground of violation of constitutional guaranties is eliminated. In short, the alleged non-federal ground and the federal ground are completely and inextricably interwoven because both are bottomed on the same assumption; and if the federal ground cannot stand, the non-federal ground cannot stand, either. The decisions of this Court are clear that an alleged non-federal ground is inadequate to support the decision below, where it is so interwoven with the federal ground as not to be an independent matter. *State Tax Commission* v. *Van Cott* (1939) 306 U.S. 511, 513-514; *Enterprise Irrigation District* v. *Canal Co.* (1917) 243 U.S. 157; 164; *Abie State Bank* v. *Bryan* (1931) 282 U.S. 765, 772-773; *Fox Film Corp.* v. *Muller* (1935) 296 U.S. 207, 210-211.

POINT TWO.

THE JUDGMENT BELOW IS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. 1257(3).

(In Reply to Respondent's Point I B, p. 9)

The decision below struck out the additional defense set forth in the Answer and finally adjudicated that Defendant could not defend by virtue of the provisions of the first paragraph of Section 29. That is a perfectly clear adjudication of the crucial right of Petitioner to defend under the statute; and the Respondent is wholly in error in saying that "no right of the Petitioner has been adjudicated" (Respondent's Brief p. 9).

Moreover, it is an adjudication of the only federal question in the case; even Respondent does not attempt to describe any other federal question which could conceivably arise in the case hereafter. It is a simple negligence case which cannot remotely give rise to any further federal question.

POINT THREE.

THE PETITION PRESENTS A FEDERAL QUESTION OF THE MOST SUBSTANTIAL CHARACTER:

(In Reply to Respondent's I C, p. 12)

Here Respondent argues that the Petition presents "no substantial" federal question. In the next breath he attacks the statute in question as "hydraheaded", "unfair", "peculiarly oppressive" and "unreasonable". We deny that any of these sinister adjectives can be applied to the first paragraph of Section 29. That they cannot be so applied is shown, in part, by the fact that Respondent does not dispute, except by general assertion, that no "classifications" have been created by the paragraph, but that on the contrary it treats all persons alike in the same situation and circumstance.

Above all, Respondent does not deny that the basic question of whether this statute is unconstitutional as beyond the scope of police power, on the theory that it does not even regulate the master-servant relationship, is a federal question of far-reaching importance.

* * *

We shall discuss the other points in Respondent's Brief at lesser length.

1A. Questions As To the Operation and Effect of the Statute Are For This Court:

(Respondent's Brief, p. 13)

The question whether the first paragraph of Section 29 regulates the employment relationship, is not, as Respondent asserts, one of construction of the statute, but a question as to its operation and effect. As a question of the operation and effect of the statute it is a prime question for this Court, and the decision of the State Court is not binding. *Richfield Oil Corporation* v. *State Board of Equalization* (1946) 329 U.S. 69, 84 and cases cited.

1B. The Effect of the Decision Below Is To Deny Petitioner the Benefits of the Tenth Amendment:

(Respondent's Brief, p. 13)

Respondent does not deny that the existence of the police power is federally guaranteed to the States and to the people thereof by the Tenth Amendment. He does, however, deny that it is guaranteed to the Legislatures of the States, or to the Petitioner as one of the people of the State of Illinois. We submit that the benefits of the Tenth Amendment's guarantee of the police power clearly extend to both the Illinois Legislature and the Petitioner.

The State Judiciary has now erroneously overruled the State Legislature on a federal question—the scope of the police power. In doing so it has (a) denied this Petitioner the benefits of the statute and of the Tenth Amendment; and (b) erroneously confined the police power to a scope narrower than that which the Illinois Legislature is entitled to exercise under the Tenth Amendment, leaving it powerless to deal further with the subject.

1C. The Decision Below Does Conflict With the Meese Case:

(Respondent's Brief, pp. 14-15)

Respondent does not deny that the Washington statute was held to be constitutional in the *Meese* case as against a claim of denial of equal protection. The claim was there considered to be rather flimsy, as we submit it is here. He also does not dispute that the theory of that decision was that the similar statute there involved did regulate the master-servant or employment relationship.

The *Meese* case, incidentally, was cited by us below both in Petitioner's Petition for Rehearing, filed on April 14, 1952, and also in Petitioner's Motion for Leave to File a Petition for Rehearing addressed to the revised and amended decision of May 20, 1952, filed on June 2, 1952.

2. Respondent Does Not Dispute That The Decision Below Conflicts With All Other Cases Upholding the Constitutionality of Similar Laws:

(Respondent's Brief p. 15)

He merely says that this fact is "irrelevant". He says further that the cases on pp. 18 and 19 of our Petition were not cited in the Court below. They were not cited

in the original briefs because Petitioner at that time did not anticipate that the Court below would hold that the statute did not even regulate the master-servant employment relationship. The argument that the statute did regulate the master-servant relationship was strongly urged in the Petitions for Rehearing.

3. The Statute Does Not Set Up Any "Classifications":
(Respondent's Brief p. 16)

Except to refer in general terms to the decision below, Respondent does not suggest that any arbitrary "classifications" have been set up; and he does not dispute that the real effect of the statute is to treat all persons alike in the same situation and circumstance.

In saying that we had conceded that "classifications" had been set up by the statute, the Court below very definitely did misstate our contentions. We there argued vigorously that the statute set up no classifications at all. Since our Petitions for Rehearing in the Court below are a part of the certified record in this Court, we respectfully refer the Court to our Petition for Rehearing, notably Point I contained at pp. 1-7 thereof; and to our Motion for Leave to File a Petition For Rehearing of the Court's Amended Decision of May 20, notably Point I contained at pp. 3-7 thereof. The Court below never faced or considered that argument, its opinion merely rolling along on the assumption that "classifications" had been set up by the statute.

4. That Plaintiff Grasse is Estopped to Assail the Constitutionality of the Act is Federal Law.
(Respondent's Brief, p. 17)

Respondent makes no attempt to dispute the argument contained in our Petition, pp. 21-23, that Grasse having claimed benefits under the Act with one hand is estopped

to assail its constitutionality with the other. Nor does he attempt to reply to *Daniels* v. *Tearney* (1880) 102 U. S. 415 and the other federal cases cited in our Petition.

5. Respondent does not dispute that the first paragraph of Section 29 is wholly integrated with the balance of the Act (Respondent's Brief p. 17).

6. Respondent does not deny that the decision below invalidates the statute as to Third Party Employers automatically bound, but sustains it as to those electively bound. We do not accept his estimate that those electively bound do not exceed 2% of the total number (Respondent's Brief p. 18).

7. The Importance of Review By This Court:
(Respondent's Brief, p. 18)

Respondent does not dispute that if the decision below is to stand, 1,000 to 5,000 new lawsuits against Third Party Employers already liable for Workmen's Compensation will be filed within the next year and within each succeeding year, on the already burdened Illinois Courts.

We deny the charges in Respondent's Brief, p. 18 that the first paragraph of Section 29 is "arbitrary" and unfair. He asserts that the new flood of lawsuits created by the decision below is wholly justifiable because they may be filed against "tortfeasors" who "formerly enjoyed immunity". But here he is in the most serious error. First, the case does not involve "tortfeasors" generally, but only Third Party Employers specifically, that is, people who have an employment relationship. They have not formerly enjoyed any immunity at all. Indeed, by virtue of the fact that they are bound by the Illinois Workmen's Compensation Act, they were made lia

ble without fault for compensation to their own employees; and also to employees of First Party Employers negligently injured by their employees. A statutory liability for compensation has been substituted for the old common law liability, and it is a considerably greater liability, for the very purpose of Workmen's Compensation Acts was to impose a new system of rules carrying greater liability for employers. See *New York Central R. R.* v. *White* (1916) 243 U. S. 188.

Moreover, the amount payable as compensation frequently exceeds the amount recoverable in a negligence lawsuit against a Third Party Employer. First, the hazards of a lawsuit sometimes make any recovery impossible through difficulty of proof of negligence, freedom from contributory negligence, agency, etc.; while compensation under the Act is certain. Second, even where recovery is accomplished, the amount allowed as compensation is still often larger than the amount recoverable in tort. Thus in *Henson Robinson Co.* v. *Industrial Commission*, (1944) 386 Ill. 232, the Employee recovered $1,500 from the Third Party Employer in his suit for negligence, but was awarded compensation of $6,105. In *Feesek* v. *William Spencer & Sons*, (1935) 176 Atl. 196, Sup. Ct. N. J., compensation was awarded in the sum of $5,730.34, although the judgment entered against the Third Party Employer in a suit for negligence was only in the sum of $5,000. In *Ketler Company* v. *Industrial Commission*, (1946) 392 Ill. 564, compensation of $4,895 was awarded, while common law recovery against the Third Party Employer in tort was only $4,000.

It is futile for Respondent to say that he does not have any cash benefits in his pocket. The hospital expenses paid for his account have the same legal effect as if they were paid to him in cash; and Respondent concedes that he has been paid substantial sums in addition, as weekly benefits.

CONCLUSION.

A Writ of Certiorari should be granted.

Respectfully submitted,

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